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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

TARA TERRY, Plaintiff and Appellant, v. MORGAN, LEWIS & BOCKIUS, LLP, Defendant and Respondent.	B228699 (Los Angeles County Super. Ct. No. BC422306)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard Fruin, Jr., Judge. Affirmed.

Tara Terry, in pro. per., for Plaintiff and Appellant.

Morgan, Lewis & Bockius, Barbara A. Fitzgerald and Jason S. Mills, for Defendant and Respondent.

Tara Terry appeals from the court's entry of summary judgment dismissing her breach of contract, intentional tort, and retaliation complaint against her employer, the law firm Morgan, Lewis & Bockius, LLP. We affirm.

FACTS AND PROCEEDINGS

Appellant Tara Terry worked as a legal secretary for respondent law firm Morgan, Lewis & Bockius, LLP. In September 2005, appellant gave notice that she intended to quit her job in order to take a job with a bank. Morgan, Lewis & Bockius partner Michael Horton hoped the firm could convince appellant to remain with the law firm. Appellant's new job at the bank paid a $70,000 annual salary, a $5,000 signing bonus, and an "8% target bonus." Hoping to persuade appellant to stay with respondent, respondent's human resources director offered to match the bank's salary and signing bonus (which respondent characterized as a "retention bonus"); appellant alleges respondent additionally promised to pay appellant a "target bonus," but respondent denies doing so. On September 23, 2005, which was to be her last day with respondent, appellant rescinded her acceptance of the bank's job offer and accepted respondent's offer to remain with respondent. A few hours later that day before the close of business, respondent informed appellant that respondent did not pay its employees any bonuses. Respondent therefore withdrew its offer to pay appellant a retention bonus, and, to the extent respondent had offered an "annual target bonus" withdrew that, too.

The following week on September 28, appellant signed an employment contract under which respondent partially reversed course. Under the contract, respondent promised to pay appellant an annual salary of $70,000. Additionally, respondent agreed to pay appellant a $5,000 retention bonus as originally promised. The contract did not, however, contain an annual target bonus. From the time she signed the contract up to, and including, when she filed her complaint at issue in this appeal, appellant remained employed by respondent. During that time, respondent fulfilled the terms of its written contract with appellant.

On September 22, 2009, almost four years after appellant signed the written agreement, appellant filed her complaint against respondent. She alleged respondent induced her to decline the bank's job offer by offering her a contractual benefit which respondent did not fulfill, namely an 8 percent "annual target bonus." Her complaint alleged causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, and intentional infliction of emotional distress. Additionally, appellant alleged respondent retaliated against her for exercising her rights in 2009 under the Family Rights and Family Leave Acts; we discuss the circumstances of appellant's retaliation claim in greater detail later in this opinion. (Gov. Code, §§ 12945.1 & 12945.2, 29 U.S.C. § 2601 et seq.)

Respondent moved for summary judgment or adjudication. Respondent argued appellant's contract, fraud, and intentional infliction of emotional distress causes of action were untimely under the applicable statutes of limitations. Respondent additionally argued no evidence supported appellant's claims. Following a hearing, the court entered judgment for respondent largely for the reasons urged by respondent. Among other things, the court found a two-year statute of limitations barred appellant's causes of action for breach of oral contract and intentional infliction of emotional distress, and a three-year statute of limitations barred appellant's fraud cause of action. The court also found no disputed facts that indicated respondent failed to fulfill its written contractual obligations, retaliated against appellant for taking leave under the Family Rights and Family Leave Acts, or invaded appellant's privacy. This appeal followed.

DISCUSSION

1. *Statute of Limitations*

a. Breach of Contract and Implied Covenant of Good Faith and Fair Dealing

When appellant accepted respondent's offer on September 23, 2005, to remain with the firm, respondent purportedly promised appellant an 8 percent "annual target bonus." Later that day, however, respondent withdrew its offer to pay bonuses of any

type, and when appellant signed her employment contract the following week the contract did not provide a target bonus. Appellant filed her lawsuit in September 2009, more than two years after respondent purportedly breached its oral promise to pay a target bonus. Because a two-year statute of limitations applies to breach of an oral contract, the court correctly found appellant's contract causes of action filed four years after respondent withdrew its offer to pay a target bonus were untimely. (Code Civ. Proc., § 339, subd. (1).)

Appellant contends respondent's partner Horton encouraged her to seek overtime or value bill in lieu of receiving a target bonus. According to appellant, Horton's suggestion constituted an oral modification of her employment contract. Appellant reasons that a new breach of that modification occurred each year, up to and including 2009, when she did not receive annual target bonuses disguised as overtime or value billing. Appellant alternatively contends respondent did not breach her employment contract until September 2006, which was one year after respondent made its promise to pay an annual target bonus. Appellant's contentions rest on factual assertions she did not develop in the trial court. Moreover, appellant cites no authority and develops no argument why the breach occurred in 2006 instead of September 2005 when respondent told appellant that respondent would not pay an annual target bonus. Consequently, she did not preserve her points for appeal. (*Roger H. Proulx & Co. v. Crest-Liners, Inc.* (2002) 98 Cal.App.4th 182, 204; *Johanson Transportation Service v. Rich Pik'd Rite, Inc.* (1985) 164 Cal.App.3d 583, 588 ["possible theories not fully developed or factually presented to the trial court cannot create a 'triable issue' on appeal."].)

b. Fraud

Appellant contends respondent fraudulently induced her into signing her employment contract by promising to pay her an annual target bonus. The court correctly found appellant's fraud cause of action was untimely because the statute of limitations for fraud is three years, but appellant waited four years to file her complaint. (Code Civ. Proc., § 338, subd. (d).) Moreover, reliance is an essential element of fraud, but appellant

knew as of the close of business on September 23, 2005 – the day she accepted respondent's offer and withdrew her acceptance of the bank's job – that respondent did not intend to pay her a target bonus. (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 326.) Hence, appellant cannot have relied on the promise of an annual target bonus when she signed her employment contract five days later on September 28.

c. Intentional Infliction of Emotional Distress

Appellant contends respondent's withdrawal of its purported promise to pay her an 8 percent annual target bonus constituted the intentional infliction of emotional distress. The statute of limitations for intentional infliction of emotional distress is two years. (Code Civ. Proc., § 335.1) Appellant does not discuss when her cause of action accrued, but assuming her emotional injury, if any, occurred when she learned that respondent would not pay her a target bonus, the trial court correctly found her cause of action was untimely because appellant filed her complaint four years after respondent withdrew the promise.

Apart from the untimeliness of appellant's cause of action, the court also correctly found that appellant's remedy, if any, for intentional infliction of emotional distress fell exclusively within the workers' compensation system. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 902; *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 25; *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 160.) Appellant notes that risks outside the compensation agreement do not fall under workers' compensation exclusivity. The sole example she cites, however, of an injury falling outside the compensation system's exclusivity is false imprisonment. Because nothing akin to false imprisonment occurred here, her reliance on that example is inapt.

2. *The Court Correctly Understood That the Implied Covenant of Good Faith and Fair Dealing Applies to More Than Insurance Contracts*

Appellant contends the court erroneously concluded that the implied covenant of good faith and fair dealing applies only to insurance policies and not to employment

contracts such as hers. Appellant misperceives the court's ruling. The court's tentative ruling issued before the hearing on respondent's motion for summary judgment did in fact state that the covenant applies only to insurance policies. During oral argument, however, the court corrected its mistake by noting the covenant applies generally to contracts, including employment contracts, to ensure contracting parties do not frustrate a contract's purpose. (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 353, fn. 18.) The court's comments during the hearing show the court understood the governing legal principles despite the statement in its tentative ruling.

3. *No Extreme and Outrageous Conduct*

The trial court found respondent's conduct was not extreme or outrageous. Appellant contends the court erred because respondent acted outrageously by (1) fraudulently inducing her to sign her employment agreement; (2) instructing her to indirectly earn an annual target bonus through overtime and value billing; (3) investigating the circumstances of her 2009 medical leave; and (4) inquiring whether she abused drugs or alcohol.

"A cause of action for intentional infliction of emotional distress exists when there is "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050.) "A defendant's conduct is 'outrageous' when it is so 'extreme as to exceed all bounds of that usually tolerated in a civilized community.' " (*Id.* at pp. 1050-1051; see also *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 499, fn. 5.) An employer's routine personnel decisions usually do not constitute extreme or outrageous conduct supporting a claim for intentional infliction of emotional distress no matter how much those decisions might disturb or upset an employee. "Managing personnel is not outrageous conduct beyond the bounds of human decency, but rather conduct essential to the welfare and prosperity of society. A simple pleading of personnel management activity is insufficient to support a claim of intentional infliction of emotional distress, even if improper motivation is alleged. If personnel management

decisions are improperly motivated, the remedy is a suit against the employer for discrimination." (*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 80.) Apart from identifying the four purported instances of outrageous or extreme conduct, appellant does not analyze with citations to the record and legal authority how those acts supported a claim for intentional infliction of emotional distress. Given that intentional infliction of emotional distress is restricted to the most despicable conduct (Rest.2d Torts, § 46), her contention thus fails. (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700.)

4. *No Triable Issue of Fraud, Malice or Oppression to Support Punitive Damages*

Appellant contends triable issues existed whether respondent acted with fraud, malice, or oppression sufficient to support punitive damages. Respondent's purportedly actionable conduct involved the same sets of facts underlying her tort and contract claims, namely respondent submitted her employment contract to her after withdrawing its promise to pay an annual target bonus, and encouraged her to use overtime and value billing to receive such a bonus indirectly. We have already concluded the underlying conduct was not actionable.

5. *No Retaliation for Taking Leave Under Family Rights Act*

On April 13, 2009, appellant told her supervisor that she planned to go to the emergency room that evening because she was ill. The next day, appellant telephoned the supervisor to report her doctor had ordered her not to return to work for a week. On April 16, respondent's human resources department asked appellant to provide a doctor's note for her absence. Appellant faxed to respondent a doctor's note stating she could not work due to "medical illness" from April 14 to April 21, 2009. After faxing the note, appellant called respondent to ensure respondent had received the fax. During the conversation, appellant requested permission to take medical leave and respondent asked appellant's diagnosis, which appellant refused to disclose. After the conversation, respondent sent to appellant by overnight mail paperwork for appellant to apply for

medical leave. The application informed appellant that her leave was preapproved pending her submission of the proper paperwork. Ultimately, however, appellant did not submit the paperwork and did not request leave. Instead, she returned to work on April 23 with a doctor's note stating she could resume her normal duties with no restrictions. Appellant alleges that despite having received medical clearance, respondent inquired after she returned to work about her medical condition and whether she was abusing drugs or alcohol.

In July 2009, appellant took medical leave, apparently for the same undisclosed medical condition as her one week absence the previous April. While she was on leave, respondent asked appellant her diagnosis in connection with directing her to submit a doctor's note clearing her to return to work. When appellant returned to work in December 2009, she resumed her pre-leave job duties and position.

Before appellant's one-week absence in April 2009, respondent completed in February 2009 appellant's annual performance review. Respondent did not change the review between its February completion and its delivery to appellant in May 2009. From the start of appellant's employment with respondent, appellant consistently received "exceeds expectations" or "fully meets expectations" ratings in 15 of 16 job-performance categories. The only category in which she fell short was "dependability" for which respondent rated her as "some development needed" in 2004 and 2006, and as meeting expectations in 2005 and 2008 but for which respondent counseled her about needing to improve her attendance and punctuality. Appellant's 2009 review continued her pattern of very favorable ratings in 15 categories for which she fully met or exceeded expectations. But also consistent with past reviews, respondent counseled appellant on her dependability, an area in which respondent rated appellant as "Meets Many Requirements/Some Development Needed." According to the review, appellant had a pattern of arriving late to work and recording excessive absences. The review stated "One thing [appellant] must focus on is to plan ahead and give more notice when she will be out of the office. [¶] [Appellant] must improve in her arrival start time and also her unplanned absences."

Appellant alleges respondent retaliated against her for taking medical leave. A necessary element of a retaliation claim is appellant must show she suffered an adverse employment action, such as termination, fine, or suspension, because she exercised her right to take medical leave. (*Dudley v. Dept. of Transportation* (2001) 90 Cal.App.4th 255, 261.) The adverse action must be substantial and detrimental. (*Horsford v. Board of Trustess of California State University* (2005) 132 Cal.App.4th 359, 373; *Guz v. Bechtel National Inc.*, *supra*, 24 Cal.4th at p. 355.) Without developing any argument supported by legal authority, appellant contends respondent retaliated against her by requesting her diagnosis even though she had "provided valid medical certifications" justifying her leave.

The trial court rejected appellant's cause of action because the court found appellant offered no evidence that the terms of her employment changed after she took her leave. The trial court also concluded that nothing supported appellant's argument that respondent's requesting her diagnosis violated statutes governing appellant's medical leave. Appellant's reliance on *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 414 for the proposition that respondent violated the law by requesting her medical information is misplaced. In *Pettus*, an employee's psychiatrist violated the employee's right to medical confidentiality by releasing without authorization information about the employee. Nothing akin to *Pettus* happened here.

6. *No Invasion of Privacy*

Appellant contends respondent violated her privacy by asking about her diagnosis and medical history. Invasion of privacy occurs when a defendant in a manner highly offensive to a reasonable person intentionally intrudes into a place, conversation, or matter over which the plaintiff had a reasonable expectation of privacy. (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 285.) Appellant notes she has a reasonable expectation of privacy in her medical history and records. Appellant presents no reasoned analysis supported by legal authority, however, that an isolated question or two about an employee's fitness to return to work by an employer's managers and human

resources department – questions which appellant refused to answer – constitute an intrusion or invasion that would be highly offensive to a reasonable person, especially when no adverse consequence followed. Appellant's reliance on *Pettus v. Cole, supra,* 49 Cal.App.4th at page 414 is inapt because there an employee's psychiatrist violated the confidentiality of the employee's medical records by releasing them without the employee's authorization. Here, appellant's records were not released, and appellant maintained their confidentiality by refusing to answer respondent's questions about them. Appellant's reliance on *Bindrim v. Mitchell* (1979) 92 Cal.App.3d 61, disapproved on another point by *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 846 footnote 9, is equally misplaced. There, a defendant was sued for libel and defamation over the defendant's novel portraying a fictional psychologist's use of "nude therapy" where the novel's psychologist was a thinly disguised representation of the plaintiff. (*Bindrim* at pp. 69, 79.) *Bindrim* has no bearing here because appellant does not allege a cause of action for defamation or libel.

DISPOSITION

The judgment is affirmed. Respondent to recover its costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.